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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 634

C. W. BRENNAN, *Petitioner*,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	Page
CITATION TO OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
1. Importance of This Case as Precedent; The Rulings Below Undermine the Reliability of Issued Federal Land Patents	6
2. Petitioner's Position is Supported by the Rulings of This Court	8
3. Petitioner's Suit is Timely; Respondent Tried to Vary the Patent in 1964; A Reservation of "Oil . . . in the Lands" Does not Include Oil Shale	11
CONCLUSION	16
APPENDIX:	
Opinion and Order of the District Court Filed March 1, 1966	1a
Opinion of the Court of Appeals Filed June 22, 1967	27a
Decision of the Bureau of Land Management Approved January 20, 1964 by Respondent	36a
Act of July 17, 1914, 30 U.S.C. 121, 122, 123	38a
Act of March 3, 1891, as amended, 43 U.S.C. 161, 162, 164	40a

CITATIONS

CASES: Page

Ard v. Brandon (1895) 156 U.S. 537, 30 L.Ed. 524 .. 9
Broder v. Natoma Water & Mining Co. (1879) 101 U.S. 274, 25 L.Ed. 790 11
Brown v. Spilman (1895) 155 U.S. 665, 39 L.Ed. 304 13
Burke v. Southern Pac. R. Co. (1914) 234 U.S. 669, 58 L.Ed. 1527 .....12, 13
Champlin Refining Co. v. Corporation Commission (1932) 236 U.S. 210, 76 L.Ed. 1062 12
Gird v. California Oil Co. (S.D.Cal. 1894) 60 Fed. 531 13
Keane v. Brygger (1895) 160 U.S. 276, 40 L.Ed. 426 11
Knapp v. Alexander-Edgar Lumber Co. (1915) 237 U.S. 162, 59 L.Ed. 894 9
Lovelace v. Southwestern Petroleum Co. (6 Cir. 1920) 267 Fed. 513 13
Nelson v. Northern Pacific R. Co. (1903) 188 U.S. 108, 47 L.Ed. 406 11
Ohio Oil Co. v. Indiana (1900) 177 U.S. 190, 44 L.Ed. 729 .....12, 13
Payne v. New Mexico (1921) 255 U.S. 367, 65 L.Ed. 680 9
Sturr v. Beck (1889) 133 U.S. 541, 33 L.Ed. 761 8
Union Pacific v. Harris (1910) 215 U.S. 386, 54 L.Ed. 246 10
United States v. Kostelak (D.C. Mont. 1913) 207 Fed. 447 11
United States v. Standard Oil Co. (D.C.S.D. Cal. 1937) 21 F.Supp. 645 13
United States v. Turner (C.C.Ala. 1892) 54 Fed. 228 11
Webb. v. American Asphaltum Co. (C.C.A. Colo. 1907) 157 Fed. 203 15

INTERIOR DEPARTMENT RULINGS:

Assessment Work on Oil Shale Claims (1928) 52 L.D. 333 14
Ralph T. Richards (1928) 52 L.D. 336 15
Smallhorn Oil Shale Refining Co. v. Crampton (1928) 52 L.D. 329 4
State of Utah (1964) 71 I.D. 392 15
Tulare Oil and Mining Co. (1899) 29 L.D. 269 15
Union Oil Company (1897) 25 L.D. 251 15
Union Oil Company of California, Ramon P. Colvert, Colorado 03022, etc. (June 28, 1957) Gower Fed. Serv. BLM 1957-87, aff'd 65 I.D. 245 15

STATUTES: Page

Act of March 3, 1891, as amended, 43 U.S.C. 161, 162, 164 (enlarged Homestead Act) 2, 3
Act of June 25, 1910, 43 U.S.C. 141, 142 11
Act of July 17, 1914, 30 U.S.C. 121-123 .....2, 4, 16
Administrative Procedures Act, 5 U.S.C. 701 et seq. 5
Mineral Leasing Act of 1920, 30 U.S.C. 181, et seq. 15
Synthetic Fuels Act, 30 U.S.C. 321 et seq. 15

MISCELLANEOUS:

24 Am. Jur. GAS AND OIL §§ 1 and 2, pp. 516-518 13
Bulletin 641 U.S. Geological Survey 1916 14
Code of Federal Regulations § 221.2 (p) of Title 30 14
Internal Revenue Ruling 57-529 (1957) IRS Bull. 45 15
Mineral Industries Bulletin (Jaffee, March 1962, Vol. 5, No. 2) 14
Practical Oil Geology (1918) 3rd Edition "Oil Shales Defined" 14
The Law Relating to Oil & Gas, Thornton, 2nd Ed. 1912, §§ 21, 23 13
The Manual of Oil and Gas Terms (2nd Ed. 1964) Williams & Meyers 13
Webster's Dictionary (1913 Ed.); Webster's Collegiate Dictionary, 5th Ed. 1953) 13, 15

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v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

C. W. Brennan, Petitioner, prays that a Writ of Certiorari issue to the United States Court of Appeals for the Tenth Circuit in which judgment was entered on June 22, 1967.

A certified Appendix record in this case together with a certified copy of the proceedings of the Court of Appeals is furnished herewith in accordance with the Rules of this Court.

CITATION TO OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado is reported at 251 F. Supp. 12, and is printed in the Appendix to this petition at pages 1a-26a. The opinion of the Court of Appeals for the Tenth Circuit is not yet reported but is printed in the Appendix at pages 27a-35a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 22, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Can a homesteader who has done everything required of him to earn his land patent from the United States, except the formality of making his proof and paying his final filing fee (both of which he was ready to do) be compelled upon pains of losing his homestead, to relinquish a part thereof?

2. Can a reservation of three specified n nerals in a land patent be enlarged to embrace an unnamed mineral by reason of novel administrative action and determination coming years after the patent issued?

STATUTES INVOLVED

The statutory provisions involved are the *Act of July 17, 1914,* 30 U.S.C. 121-123, and the *Act of March 3, 1891,* as amended, 43 U.S.C. 161, 162, 164, the texts of which are printed in the Appendix hereto at pages 38a to 41a, respectively.

STATEMENT OF THE CASE

In 1907, a homesteader, George Baxter, settled certain agricultural lands in Colorado (R. 136, 156-157). He paid his entrance fees in 1909 (R. 157). By December, 1912, he had completed the requirements of residence and cultivation for three years (R. 138, 139-145) which under the enlarged *Homestead Act*[1] earned him a right to a patent for his homestead. In 1916, before Baxter had tendered his final proofs and filing fees of $8.25 (which he did in 1917 (R. 135)), the Director, Geological Survey, classified several million acres of land in Colorado and Utah, including the township containing Baxter's homestead, as prospectively valuable for deposits of oil shale (R. 201-202).

When Baxter attempted to secure issuance of his patent, he was advised by the local Land Office Commissioner that he would not be "allowed to proceed" further with his proofs unless he first executed and returned[2] a "Petroleum Waiver."[3] This Baxter did.

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[1] 43 U.S.C. 161-164.

[2] The Commissioner's letter stated in this regard:

> "The Petroleum waiver inclosed herewith must be signed by yourself and two witnesses, and returned to this office, before you will be allowed to proceed with your proof." (R. 145).

[3] The Petroleum waiver read:

> "I, George H. Baxter, having made Homestead Entry, Serial No. 03874 of the following described land: SW ¼ SW ¼ Sec. 16, N ½ NW ¼, SW ¼ NW ¼ Sec. 21 Tp. 2S R. 97 West, 6 P.M. hereby apply to have my entry considered as made under the Act of July 17, 1914 (38 Stat. 509) and hereby consent that the patent issued to me thereunder shall contain the provisions, reservations, conditions and limitations of the said act" (R. 149).

A Final Certificate was issued to Baxter on January 25, 1917; it did not mention oil shale (R. 131). On September 22, 1917, a patent was issued to Baxter conveying to him all right, title and interest in his homestead, except for certain water rights, and:

> "Excepting and reserving also, to the United States *all the* nitrate, *oil, and gas in the lands* so patented, and to it, or persons, authorized by it, the right to prospect for, mine, and remove *such deposits* from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914." (R. 160-161) (Emphasis supplied).

The Land Office file for Baxter's entry contains no evidence, and no evidence was presented at trial to show Baxter agreed to or was told of the desire of the Land Office to reserve oil shale (R. 131-160). *The Act of July 17, 1914, supra,* referred to in the Petroleum Waiver, Final Certificate and Patent does not mention oil shale.

In 1963, Brennan, a purchaser and successor in title to Baxter, because of ambiguities subsequently raised by various administrative acts, petitioned the Director, Bureau of Land Management, for a declaration that the oil shale underlying Baxter's land was not reserved in that patent. In 1964, Respondent approved a ruling by the Director that oil shale was reserved in the Baxter patent. This ruling was based primarily upon the Land ~~Development's~~ Departments earlier decision in *Smallhorn Oil Shale Refining Co.* v. *Crampton* (1928) 52 L.D. 329, holding that the terms "oil and gas" used in a reservation made pursuant to *The Act of July 17, 1914, supra* included oil shale (App. 36a-37a).

Petitioner thereupon brought this action in the United States District Court for the District of Colorado to enjoin Respondent from exercising any control over the deposits of oil shale. Petitioner claimed that Respondent had exceeded his legal authority (R. 1-3). Alternatively, review was sought under Section 10 of the *Administrative Procedures Act,* 5 U.S.C. 701 et seq.

The District Court sustained Respondent's decision because of its conclusion that *The Act of July 17, 1914, supra* and the Baxter patent used the term "oil" in a "broad, generic" sense, and that it encompasses all sources of oil which were then known.[4] (App. 25a).

The Tenth Circuit, while not endorsing the trial court's reasoning, affirmed, principally upon the ground that Respondent's construction of the term "oil" was a "reasonable" one which could not be disturbed by the Courts (App. 32a).

Neither the trial court nor the Tenth Circuit addressed themselves to the issue raised by Petitioner whether the Land Office, without a hearing or notice of a right to a hearing, could restrict, either directly or

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[4] The parties at trial agreed that coal, oil and oil shale were different minerals (although oils could be manufactured from each (R. 66, 98-99) stipulating:

> "Petroleum, oil shale and coal are all hydro-carbon mixtures, usually containing other elements, such as sulphur, nitrogen and oxygen. The organic materials in oil shale called 'kerogen', as well as the organic materials in coal, are largely insoluble in oil solvents, such as benzine, ether, etc., while petroleums are essentially completely soluble therein. Each of these mixtures is a mixture of compounds, each compound having an individual chemical formula, but none of the three groups has a specific formula. However, although oil, oil shale and coal may contain the same elements, they are not chemically combined in the same manner in the three substances." (R. 86, 205)

indirectly, the scope of a patent *after* a homesteader had complied with all of the statutory requirements of law under which he entered. And, neither court addressed itself to Petitioner's contention that Respondent could not vary the otherwise clear language in a patent by subsequent administrative construction.

REASONS FOR GRANTING WRIT

1.

Importance of This Case as Precedent; the Rulings Below Undermine the Reliability of Issued Federal Land Patents

This cause involves holdings below which attack the very reliability of time honored federal land patents. Private land ownership in the West is virtually dependant upon federal patents. These are but quit-claim deeds. Therefore, if the accepted and otherwise clear language in these patents cannot be relied upon but remains open to subsequent administrative impeachment or "construction" long after issuance, then the very permanence of private land ownership in the West is dealt a serious blow.

More precisely, this cause poses the issue of whether a homesteader, prior to the filing of his final proof and filing fees therefor, but after compliance with the statutory requirements which earn him full title, can be required to turn back all of the deposits of nitrate, oil and gas in his land. And, then to aggravate the situation, may that reservation be expanded years later by administrative construction to include another mineral deposit (namely, bituminous shale or "oil shale") not specifically reserved?

Petitioner respectfully urges that determinations limiting the scope of the grant of land promised to a

homesteader must be made *before* he has earned his land by the cultivation and residence prescribed by law. Any other course allows a homesteader to spend years of his life earning his homestead only to lose it or a part of it because of an uncommunicated administrative act coming after his toil, but before he filed his proofs. Such a result, we submit, is both unconscionable and unconstitutional.

But, even assuming Respondent can unilaterally impress a reservation upon a homesteader because of a subsequent change in mineral status of the land, certainly this Court should not allow a reservation so obtained to be expanded by subsequent administrative construction, so that it also covers a deposit of a hitherto unnamed but separate mineral, namely, oil shale.

The fact that the Secretary or his predecessors may have construed an underlying law as giving authority to reserve oil shale is irrelevant.[5] The issue is whether that mineral was included in the patent reservation by clear language, not whether it could have been included.[6] If not, the mineral passed to the homesteader, and any attempt to take it back by administrative construction years later comes too late.[7] Otherwise, no patent will ever become final or safe from collateral impeachment by the issuing agency.

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[5] This was the principal point discussed in the opinions below.

[6] In point of fact Respondent did include "oil shale" specifically in over 80 per cent of the patents issued on the Colorado oil shale lands (R. 206, 207).

[7] See e.g. 43 U.S.C. 1166, which provides that while the United States may directly seek to annul a patent, such action must be instituted within six years from the date of issuance.

Respondent contends, on the other hand, that he and his predecessor had the right to impose a mineral reservation upon the homesteader at any time prior to the date when the final proofs were received and the filing fees for such paid. And, although Respondent does not explicitly so state, *a fortiori* he must also urge that once a reservation is placed in a patent, its language remains continually susceptible to his construction.

This Court has not heretofore passed upon any analogous case to that presented here. As before demonstrated, the importance of this case to the fairness and durability of private land titles in the West cannot be overstated.

2.

Petitioner's Position Is Supported by the Rulings of This Court

It is respectfully submitted that the overwhelming body of law enunciated by this Court supports Petitioner's position.

Long ago in *Sturr* v. *Beck* (1889) 133 U.S. 541, 33 L. Ed. 761, this Court approved the rationale to be followed in homestead cases, stating:

> "It was held by Attorney-General MacVeagh, in an opinion to the Secretary of War, July 15, 1881, that 'where a homestead entry of public land has been made by a settler, the land so entered cannot, while such entry stands, be set apart by the President for a military reservation, even prior to the completion of full title in the settler;' that 'upon the entry the right in favor of the settler would seem to attach to the land, which is liable to be defeated only by failure on his part to comply with the requirements of the homestead law in regard to settlement and cultivation. This right amounts

to an equitable interest in the land, subject to the future performance by the settler of certain conditions (in the event of which he becomes invested with full and complete ownership); and until forfeited by failure to perform the conditions, it must prevail not only against individuals, but against the government' 1 Land Dec. 30. And many rulings of the Interior Department sustain this view." (133 U.S. at 548; 33 L.Ed. at 764).

Accord: Knapp v. *Alexander-Edgar Lumber Company* (1915) 237 U.S. 162, 59 L.Ed. 894; *Ard* v. *Brandon* (1895) 156 U.S. 537, 39 L.Ed. 524.

And this equitable right is not dependent upon some mechanistic requirement of filing proofs or acceptance of them by the Secretary. To the contrary, the concept is based upon fundamental fairness to the homesteader. Thus, in *Payne* v. *New Mexico* (1921) 255 U.S. 367, 65 L.Ed. 680, this Court reiterated:

"In the brief for the officers it is frankly and rightly conceded to be well settled that 'a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the government, and that his right to a legal title is to be determined as of that time'; and also that this rule 'is based upon the theory that, by virtue of his compliance with the requirements, he has an equitable title to the land; that in equity it is his, and the government holds it in trust for him'. * * * Payne v. Central P. R. Co., 255 U.S. 228, ante, 598, 41 Sup. Ct. Rep. 314. But it is said that as the selection is 'subject to the approval of the Secretary of the Interior', no right can become vested, nor equitable title be acquired thereunder unless and until his approval is had; and therefore that the rule just stated is not applicable here. To this we cannot assent". (255 U.S. at 371; 65 L.Ed. at 683).

Nor can it be seriously argued that the payment of some minor final filing fee is the determinative factor in a homestead case. Where entries are made in reliance upon the pre-emption acts, which authorize, in essence, the purchase of land by a settler for money, the settler acquires his land only by tendering his money.

However, in a homestead entry as here, the settler "earns" his land by his residence and his toil, not by the payment of money or payment of some nominal filing fee. In *Union Pacific* v. *Harris* (1910) 215 U.S. 386, 54 L.Ed. 246 this Court clearly underscored that distinction:

> "While the power of Congress over lands which an individual is seeking to acquire under either the pre-emption or the homestead law remains until the payment of the full purchase price required by the former law or the full occupation prescribed by the latter, yet, under the general land laws of the United States, one who, having made an entry, is in actual occupation under the pre-emption or homestead law, cannot be dispossessed of his priority at the instance of any individual." (215 U.S. at 388-389; 54 L.Ed. at 248).

The teaching from the aforesaid cases is clear: A homesteader must be allowed to earn all of what he was originally promised for so long as he is attempting to comply with the law.

Over the years, Congress and this Court have been most careful to protect the rights of the entryman against subsequent erosion so long as he was endeavoring to comply with or did comply with the require-

ments of the law.[8] See e.g. *Keane* v. *Brygger* (1895) 160 U.S. 276 at 287, 40 L.Ed. 426; *Nelson* v. *Northern Pacific R. Co.* (1903) 188 U.S. 108, 47 L.Ed. 406; *Broder* v. *Natoma Water & Mining Co.* (1879) 101 U.S. 274, 25 L.Ed. 790; *United States* v. *Turner* (C.C. Ala. 1892) 54 Fed. 228; *United States* v. *Kostelak* (D.C. Mont. 1913) 207 Fed. 447.

3.

Petitioner's Suit Was Timely: Respondent Tried To Vary the Patent in 1964; a Reservation of "Oil * * * in the Lands" Does Not Include Oil Shale

Had Respondent been content with the three minerals specifically reserved under the instant patent, then there might be some justification for Respondent and the courts below to contend that the present challenge by Petitioner comes too late (App. 35a). This, however, is not what occurred.

In 1964, long after the patent here involved issued, Respondent in response to a query by Petitioner arising from doubtful language in other cases, ruled that the term "oil" as used in the Baxter patent reservation also included oil shale. It is that ruling which precipitated the instant litigation, and which, if sustained, opens the door to collateral agency impeachment of long issued patents. And, it is that ruling which Petitioner timely challenged in the Courts below and now urges this Court to review.

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[8] See e.g. *The Act of June 25, 1910*, 43 U.S.C. 141, 142, which, while authorizing the withdrawal of mineral lands, prohibited such a withdrawal from affecting or preventing lands embraced in a prior but incomplete entry from being patented to the entryman. Here, the Secretary attempts to achieve indirectly this very result by utilizing a "classification" instead of a withdrawal.

Respondent's attempt to include oil shale in the reservation found in the Baxter patent by redefining the patent is shocking indeed. In the first place, Baxter's patent speaks in terms of deposits of "oil . . . in the land"; it does not reserve simply "oil" nor does it speak in terms of base deposits from which "oil" can be manufactured (R. 160-161).

Secondly, as revealed by the stipulation entered into at trial, oil and oil shale are, as a matter of fact, different minerals, chemically, organically and minerally.

Thirdly, in both law and common usage, the mineral term "oil" has been virtually unanimously held to refer only to the hydrocarbons found existing naturally in the earth as a liquid. In short, "oil" refers to the liquid mineral known as "oil", not solid minerals such as coal or oil shale from which liquid oils can be manufactured.

The leading case defining "oil" is *Ohio Oil Co.* v. *Indiana* (1900), 177 U.S. 190, 44 L.Ed. 729. This Court there ruled:

> "* * * True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed situs under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the surface must exercise their rights." 177 U.S. at 202-203, 44 L.Ed. at 737.

Accord: *Champlin Refining Co.* v. *Corporation Commission* (1932) 236 U.S. 210 at 233, 76 L.Ed. 1062 at 1077; *Burke* v. *Southern Pac. R. Co.* (1914) 234 U.S. 669, 58 L.Ed. 1527 (referring to petroleum or oil as a substance naturally oozing from rock); *Brown* v. *Spilman* (1895) 155 U.S. 665, 39 L.Ed. 304; *United States* v. *Standard Oil Co.* (D.C.S.D. Cal. 1937) 21 F. Supp. 645; *Gird* v. *California Oil Co.* (S.D. Cal. 1894) 60 Fed. 531 at 540; see also *"The Law Relating To Oil And Gas"*, Thornton, Second Edition 1912, §§ 21, 23: 24 Am. Jur., GAS AND OIL § 2, pp. 517-518; *The Manual of Oil and Gas Terms* (2nd Ed. 1964) Williams and Meyers.

The meaning ascribed to the term "oil" by the courts and the texts also coincides with its popular definition. Thus *Webster's Dictionary* (1913 Ed.) defines oil as:

> "One of a great variety of unctuous combustible substances, not mixable with water, as olive oil, whale oil, rock oil, etc. They are of animal, vegetable or mineral origin and of a varied composition. The mineral oils are varieties of petroleum —see 'Petroleum'."

Petroleum [9] in turn was defined as:

> " * * * rock oil, mineral oil or natural oil, a dark brown or greenish inflammable liquid, which at

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[9] The terms "petroleum" and "oil" have long been used interchangeably when referring to minerals (R. 65, 91, 92, 98, 104). See e.g. *Burke* v. *Southern Pac. R. Co., supra; Lovelace* v. *Southwestern Petroleum Co.* (6 Cir. 1920) 267 Fed. 513 at 515-517; *Gird* v. *California, supra,* 24 Am. Jur. *GAS* and *OIL*, § 1, p. 516. Indeed, the oil waiver tendered to Baxter was referred to as a "Petroleum Waiver" by the land Office. Their definitions are, of course, the same. Cf. *Burke* v. *Southern Pac. R. Co., supra,* with *Ohio Oil Co.* v. *Indiana, supra.*

> certain points exists in the upper strata of the earth, from whence it is pumped or forced by pressure of the gas attending it."

Accord: Webster's Collegiate Dictionary, Fifth Edition, 1953

And, insofar as the administration of public lands is concerned, Section 221.2(p) of Title 30 of the *Code of Federal Regulations* specifies as oil:

> "(p) *Oil, crude oil.* Any liquid hydrocarbon substance which occurs naturally in the earth, including drip gasoline or other natural condensates recovered from gas, without resort to manufacturing process."

Conversely, as the experts in this cause uniformly testified, oil shale is a solid mineral deposit containing virtually no oil as such, and this fact was known before 1900 (R. 68, 75, 96, 98, 102, 120). It is a rock, containing a solid hydrocarbon mixture known as kerogen. There can be no doubt as to the accuracy of this testimony. See: Bulletin 641, U.S. Geological Survey 1916 (R. 274-276); *Practical Oil Geology* (1918 3rd Ed.) "Oil Shales Defined"; *Mineral Industries Bulletin* (Jaffee, March 1962, Vol. 5, No. 2).

Indeed, with the apparent unique exception of cases relating to the Act of July 17, 1914, the Courts and the Interior Department have consistently ruled that the mineral known as oil shale is not embraced in the term "oil" as used in the other Acts of Congress. See e.g. *Assessment Work On Oil Shale Claims* (1928) 52 L.D. 333 (wherein the First Secretary of the Department of the Interior held that the term "oil" as used in the Placer Mining Act did not include oil shale).

Ralph T. Richards (1928) 52 L.D. 336 (holding that the term "oil" as used in the Act of 1910 did not in-

clude solid hydrocarbons); *Webb* v. *American Asphaltum Co.* (C.C.A. Colo. 1907) 157 Fed. 203; *Tulare Oil and Mining Co.* (1899) 29 L.D. 269; *Union Oil Company* (1897) 25 L.D. 251.

Indeed, in *Union Oil Company of California, Ramon P. Colvert, Colorado, 03022, etc.,* (June 28, 1957) Gower Fed. Serv. BLM-1957-87, affirmed 65 I.D. 245, the Department of Interior ruled:

> "* * * these deposits [oil and gas—as opposed to oil shale] are widely separated geologically and are present in essentially different forms. Oil shale, of itself, contains a vegetable or animal substance from which oil can be made. Further, oil shale and oil are leased under separate provisions of the mineral leasing laws. It is not necessary to resolve here whether proceedings would be in order under Public Law 585 if the identical minerals were sought by each party; the minerals here involved are not identical within the purview of the United States mining laws and the mineral laws and the mineral leasing laws".

Accord: State of Utah (1964) 71 I.D. 392. Congress, too, recognized the distinction. Thus, the *Mineral Leasing Act of 1920, as amended, supra,* repeatedly distinguishes between oil and oil shale, calling for different payments, different acreages and different methods of leasing for each. See 30 U.S.C. 181, 193, 212-227, 241. The Synthetic Fuels Act, 30 U.S.C. 321 et seq. specifically distinguishes between oil shale and oil. And, of course, the Internal Revenue Service distinguishes between oil and oil shale, using different depletion rates for each. *Internal Revenue Ruling* 57-529 (1957) I.R.S. Bull. 45 at p. 17.

In point of fact, over eighty per cent of the patents issued for lands in the oil shale area of Colorado under the Act of July 17, 1914, contained mineral

reservations which specifically distinguished between oil and oil shale (R. 206, 207). Under these circumstances, it is preposterous to assert that the reservation of "oil . . . in the lands" found in the Baxter patent by its terms includes bituminous or oil shale.

CONCLUSION

The blunt truth is that Respondent and the courts below simply enlarged the reservation in the patent here in issue to include a mineral which was not reserved. This, Petitioner submits, they cannot do. True it is that Respondent's unique views as to the scope of the term "oil" as used in The Act of July 17, 1914, may go back to 1927 or 1928 or even to 1920, but manifestly views formulated at those dates cannot be relied upon to limit a patent issued in 1917. It is this precedent which opens the door to administrative abuse and whimsy, and which, if sustained, will undermine the very reliability of western land titles. We urge review.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

[Filed February 16, 1966]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 8542

C. W. BRENNAN, *Plaintiff*,

v.

STEWART L. UDALL, Secretary of the Interior, *Defendant*.

Fred M. Winner, Esquire, Messrs. Winner, Berge, Martin & Camfield, Attorneys at Law, 500 Capitol Life Center, Denver, Colorado; Messrs. Whiteford, Hart, Carmody & Wilson, Attorneys at Law, 815 Fifteenth Street, N.W., Washington, D. C., for Plaintiff; Honorable Lawrence M. Henry, United States Attorney for the District of Colorado; David I. Shedroff, Assistant United States Attorney and Robert Mesch, Esquire, and Lowell Madsen, Esquire, Department of the Interior, Washington, D. C.

Memorandum Opinion and Order

DOYLE, Judge.

This case was tried to the Court, evidence was taken, elaborate briefs were filed, and the matter now stands submitted on the basis of extensive testimony and numerous exhibits.

The plaintiff alleges that jurisdiction is conferred on the Court by the Administrative Procedures Act, 5 U.S.C. § 1009. Plaintiff has secured a legal opinion from the Secretary of Interior with respect to the title of plaintiff's predecessor in interest. The opinion of the Secretary adversely affects plaintiff's interests and raises issues which are sufficient to permit the granting of the relief which is here requested. We find sufficient grounds to

accept jurisdiction under the provisions of the cited act and thus it is not necessary to determine whether additional jurisdictional basis exists.

Plaintiff alleges that federal question jurisdiction is present (Title 28 U.S.C. § 1331); that jurisdiction is properly based upon mandamus (28 U.S.C. § 1361); and that there is an adequate basis for jurisdiction which would grant declaratory relief (28 U.S.C. § 2201). In view, however, of our conclusion that the Administrative Procedures Act authorizes bringing of the suit and the granting of the relief demanded, it is unnecessary to determine whether the other cited provisions would also vest the Court with jurisdiction.

The defendant maintains that this suit is one that seeks to quiet title and as such is an unconsented action against the sovereign. Defendant further maintains that neither injunctive, mandamus, nor declaratory judgment relief is appropriate for the reason that the plaintiff, so it is argued, can not demonstrate imminent harm nor a clear duty not performed by defendant.

Cases relied on by defendant in support of his position that this Court lacks jurisdiction do not involve the issue of excess of administrative authority, but rather concern only challenges to the correctness of a decision committed by law to administrative discretion. See *Switzerland Company* v. *Udall,* 4 Cir. 1964, 337 F. 2d 56; *Dugan* v. *Rank,* 372 U.S. 609, 83 S. Ct. 999 (1963).

Involved herein is the question whether the plaintiff is entitled to the oil shale content of certain lands obtained by plaintiff's predecessor in title through a patent issued pursuant to the Homestead Act (43 U.S.C. § 161), and subject to the conditions of the Act of July 17, 1914, (30 U.S.C. § 121, et seq.).

The history of the Baxter patent in relationship to the 1914 Act is important to our analysis of the plaintiff's

several arguments. The application was made in 1907 by one George Baxter. In it he described the land as non-mineral. His entry onto the 160 acres of land in Township 2 South, Range 97 West, 6th P.M. Colorado was also in 1907. On December 18, 1909, Baxter filed with the Land Office at Glenwood Springs, Colorado, his formal application to enter the land under the provisions of the 1891 Homestead Act. Therein the land was described as non-mineral. A receiver's receipt was duly issued. On August 1, 1912, pursuant to the act of June 12, 1912, 43 U.S.C. § 164, Baxter filed notice of his election to make proof under the 1891 Homestead Act under which the entry was made. On July 17, 1914, Congress passed a statute "to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals." 30 U.S.C. § 121. The controversy here centers around the meaning and applicability of this statute. This 1914 Act allowed homestead entry of lands classified as mineral provided that the entryman would agree to reserve in the United States title to the mineral for which the land was classified as valuable.[1] Its purpose

[1] The pertinent provisions of the 1914 Act are as follows:

"Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the non-mineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same; but no desert entry made under the provisions of this section and sections 122 and 123 shall contain more than one hundred and sixty acres. All applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of the above-mentioned sections." (Title 30, U.S.C. § 121)

was, therefore, to allow the issuance of agricultural patents on mineral lands provided an appropriate reservation was made. Subsequently, on May 23, 1916, the Commissioner, General Land Office, acting pursuant to the 1914 Act, classified some 87,000 acres of oil-shale land in Colorado as mineral lands, valuable as a source of petroleum and nitrogen.[2]

Baxter's land was among the tracts which were classified by the Commissioner on this occasion. On June 29, 1916, the Commissioner advised the Register and Receiver at Glenwood Springs, Colorado, that the classification had been made without withdrawal and would "be operative under and subject to the provisions of the act of July 17, 1914." Baxter did not receive the letter classifying his land as oil-shale land, nor, apparently, a copy of the Commissioner's letter advising the Register and Receiver in Glenwood Springs that the classification had been made pursuant to the 1914 Act.

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[2] The pertinent terms of the classification letter are as follows:

> "The net result of oil shale investigations already made is that the oil-shale areas in Colorado, Utah, and Wyoming constitute a latent petroleum reserve whose possible yield is several times the estimated total remaining supply of petroleum in the United States.
>
> "While the data at hand are not sufficient to warrant a specific statement as to the total recoverable nitrogen content of these shales, it is believed possible that this will prove so large as to give these deposits a value as a source of nitrogen equal to their value as a source of petroleum.
>
> "In view of the high prospective mineral value of lands underlain by oil-shale deposits it is, of course, apparent that they should not be permitted to be acquired under the non-mineral land laws.
>
> "Accordingly, I hereby classify the tracts listed below as mineral lands, valuable as a source of petroleum and nitrogen, and request that you make the proper notation of the classification upon your records."

In any event, when Baxter applied to make final proof before the Glenwood Springs Register, he was advised that he would have to sign a "petroleum waiver."[3] In making final proof on January 13, 1917, Baxter certified that to his knowledge there was no indication of any kind of minerals on the land. The final certificate, issued to Baxter January 25, 1917, contained a notation that the patent was to contain provisions, reservations, conditions and limitations in accordance with the Act of July 17, 1914 "as to nitrates, oil and gas." Consequently, on September 22, 1917, Baxter was issued a patent containing the following language:

> "Excepting and reserving, also, to the United States all the nitrate, oil, and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine, and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914 (38 Stat. 509)."

Following the issuance of the patent there apparently were no noteworthy happenings until October 29, 1963. The plaintiff herein at that time petitioned the Director, Bureau of Land Management, demanding a decision that "oil shale" was not included as "oil, gas or nitrate" as used in the 1914 Act. The Bureau of Land Management issued an opinion which became the final decision of the

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[3] The pertinent provisions of this form, entitled "Consent to provisions of Act of July 17, 1914 (38 Stat. 509)" are:

> "I, . . . hereby apply to have my entry considered as made under the Act of July 17, 1914 (38 Stat. 509) and hereby consent that the patent issued to me thereunder shall contain the provisions, reservations, conditions and limitations of the said act."

Department, recorded on January 20, 1964.[4] We are called upon to determine the correctness of this decision.

In support of his theory that the Department's decision is invalid and must be reversed, plaintiff advances several arguments: *First,* that the patent itself must be strictly construed; that it fails to contain any mention of oil shale and at this late stage cannot be changed. *Secondly,* that the Secretary of Interior lacked authority to make any kind of reservation under the 1914 Act in Baxter's patent; that the Secretary lacked power to make any kind of a classification in 1916 inasmuch as Baxter had already entered the land and occupied it under the 1891 Homestead Act. In this connection, plaintiff calls attention to what is known as the "Pickett Act" of June 25, 1910, 43 U.S.C. § 141. This expressly prohibits the President from withdrawing lands entered in good faith under the homestead

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[4] The decision stated as follows:

> "The petitioners have requested a statement setting forth the Government's mineral interest in the SW-¼ SW-¼ sec. 16, N-½ NW-¼, SW-¼ NW-¼ sec. 21, T. 2 S., R. 97 W., 6th P.M. Colorado . . . The patent contained an 'oil and gas' reservation pursuant to sec. 3 of the act of July 17, 1914 (30 U.S.C. 123). This decision is limited to whether oil shale is included in the oil and gas reservation.
>
> "The Baxter entry was subject to cancellation prior to July 17, 1914, because it covered lands then valuable for oil shale and thus reserved for disposition under the mineral land laws. 43 U.S.C. 201, 30 U.S.C. 21 Cf. *Deffenbach* v. *Hawke,* 115 U.S. 392 (1885); *Colorado Coal & Iron Co.* v. *U. S.,* 123 U.S. 307 (1887). But after the act of that date, the entry could be and was passed to patent upon the entryman's consent that the patent to be issued 'thereunder shall contain the provisions, reservations, conditions and limitations of the said act.' It is clear that it was the intention of the parties to allow patent by reserving the oil shale to the United States and that the appropriate reservation of 'oil and gas' includes oil shale. *Smallhorn Oil Shale Refining Co., et al.,* 52 L.D. 329 (1928)."

laws prior to the attempted withdrawal.[5] See *United States* v. *Midwest Oil Co.*, dissenting opinion, 236 U.S. 510, 35 S. Ct. 327 (1915). The crux of plaintiff's argument in this regard is that the Secretary's power to classify lands cannot be broader than the President's power to withdraw lands.

Plaintiff also argues quite forcibly that the 1914 Act could not in any event be applied to the Baxter land in that it does not and can not have any retroactive effect; that by its own terms, when read in conjunction with its history, it applies only to entries made after its enactment.

Plaintiff's third point is that the reservation in question did not reserve oil *shale;* that the 1914 Act under which the reservation was made, reserves oil and gas and that this does not and can not result in a reservation of oil *shale.*

I.

Whether the Secretary Had Power To Classify the Land in Question.

It is important to note at the outset that Baxter's patent was an agricultural and surface one and that he signed a waiver agreeing to the reservation of the 1914 Act. He contested neither the validity of the reservation nor its accuracy. At this late date, then, it would have to appear that the reservation was clearly unauthorized in the 1914

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[5] The statute reads as follows:

"The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." Title 43 U.S.C. § 141 Withdrawal and Reservation of land for water-power sites or other purposes.

Act in order for plaintiff to be entitled to relief on the basis of his present contentions. His argument re the power of the Secretary is for the most part based upon the terms of the Pickett Act of 1910 which grants to the President authority to withdraw lands for various purposes, including classification.[6] There is nothing in the Act which suggests an intent on the part of Congress to limit the Secretary's power to classify lands; rather, the Pickett Act was designed to clarify the President's authority to *withdraw* public lands. See *United States* v. *Midwest Oil Co.*, supra.

In essence, plaintiff's argument is that to hold that there is administrative authority in the Secretary to classify lands would mean that the Secretary would have broader power in this regard than the President. If the powers are indeed the same the argument is cogent; however, we do not think that plaintiff makes a logical comparison. When land is classified by the Secretary as mineral at some time prior to patent, an affected entryman could under departmental regulations contest the accuracy and validity of the classification. However, land *withdrawn* by the President could not be challenged by a person affected. Undoubtedly, this distinction led Congress to limit the President's authority under the Pickett Act. Since, therefore, these two statutes affect the rights of patent applicants in different ways, it has to be concluded that they are distinct powers.

The case of *Stockley* v. *United States*, 260 U.S. 532, 43 S. Ct. 186 (1923), relied upon by the plaintiff, is not helpful. There the entryman had submitted all required proof and paid all required fees over two years before the Secretary sought to assert that the land was mineral. The Court held that the Secretary's action followed the expiration of the two-year statute of limitations of the 1891

[6] See footnote 5, supra.

Homestead Act, 43 U.S.C. § 1165 and for that reason was void. Moreover, in *Stockley*, plaintiff's land had been withdrawn for classification under a presidential decree expressly exempting "existing valid claims." We hold that these distinctions are substantial and that the decision is, therefore, not apposite.

Plaintiff also cites cases in which he argues that the mere entry of land removes it from the sphere of "public" land embraced within the terms of the 1879 Classification Act, 43 U.S.C. § 31, by which the Department has power to classify lands.[7] See, for example, *Knapp* v. *Alexander-Edgar Lumber Co.*, 237 U.S. 162, 35 S. Ct. 515 (1915); *Ard* v. *Brandon*, 156 U.S. 537, 15 S. Ct. 406 (1895). These decisions support generally the proposition that the Acts of Congress show a favorable attitude toward homesteaders and an effort on the part of Congress to protect their rights. But it is to be observed also that Congress has demonstrated a policy of protecting the mineral resources of the United States. It has authorized surface patents to those who might develop the nation's agricultural potential and mineral patents for those able to develop the mineral resources of the country. See *United States* v. *Sweet*, 245 U.S. 563, 38 S. Ct. 193 (1918). Hence general expressions of policy are not here controlling.

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[7] "(a) The Director of the Geological Survey, which office is established, under the Interior Department, shall be appointed by the President by and with the advice and consent of the Senate. This officer shall have the direction of the Geological Survey, and the classification of the public lands and examination of the geological structure, mineral resources, and products of the national domain. The Director and members of the Geological Survey shall have no personal or private interests in the lands or mineral wealth of the region under survey, and shall execute no surveys or examinations for private parties or corporations." 43 U.S.C. § 31(a).

The case of *Work* v. *United States,* D.C. App. 1925, 6 F. 2d 690, shows that there is a limit to the Secretary's power to deny homestead patents based on subsequent classification as mineral lands. But there more than two years had passed following plaintiff's filing of final proofs. The case does not, therefore, support the plaintiff's argument here. It does not hold that a vested right to unrestricted patent accrues upon valid entry. To hold that entry gives rise to such vested right would render meaningless the two-year statute of limitations which Congress has provided in the Homestead Act. Such holding would also be contrary to the judicial and the administrative decisions recognizing the right to classify public lands after entry and prior to issuance of patent subject of course, to regulations and the limitations statute. See *Milton H. Lichtenwalner, et al.,* 69 I.D. 71 (1962); *Stockley* v. *United States,* supra; Regulations of the Department of Interior under the 1914 Act, 44 L.D. 32 (1915).

We conclude that as long as the United States continues as the true owner of lands entered pursuant to the Homestead Act, those lands must be regarded as "public" within the meaning of the 1879 Act and subject to classification and reservation of minerals. We do not determine the extent of Baxter's right as a result of his entry; nor do we hold that the Secretary could withhold a surface patent to the entryman. We conclude merely that it was not a right to unrestricted patent on the homestead to which he had not filed final proofs. It follows, therefore, that neither the classification of Baxter's land nor the insertion of the reservation to the United States of minerals discovered thereon were rendered invalid by reason of Baxter's prior entry.

We have considered plaintiff's further argument that Baxter was given no effective notice of classification and

that he was not afforded an opportunity to challenge it. We find that the evidence does not support this contention. The letter from the Commissioner to the Glenwood Springs Register, which is notice, was on file at the office in which Baxter made his applications and proof. The Register clearly advised him by letter of the classification and of the necessity for filing a waiver. The regulations, in effect, provided for a full hearing in the event a classification of land as mineral was challenged. Baxter was apparently interested in obtaining a surface patent; it cannot be held that he took the patent without knowledge. Rather, it would appear that he was not interested in any mineral rights. His signing of the waiver under the mentioned circumstances is inconsistent with the conclusion that he was denied notice of an opportunity to challenge the reservation.

II.

Whether the 1914 Act by Its Terms Applies to Entries Made Prior to Its Enactment.

In arguing that the 1914 Act is not to be read so as to apply to lands entered prior to classification or to lands entered prior to its enactment, plaintiff relies for the most part on the act's legislative history. From this it is contended that the intent of Congress was to not allow classification of lands which had been entered prior to enactment or prior to classification. Legislative history is, of course, a valuable aid to statutory interpretation where the intent of Congress is questionable. Where, however, the act is not ambiguous its history is much less significant. The first question, therefore, is whether the terms of the act are clear.

Section 3 of the 1914 Act expressly deals with the problem presented when a person enters land subsequently classified, withdrawn or reported.[8]

Section 2 permits persons who have entered lands subsequently classified or withdrawn to establish the nonmineral character of the land.[9] Plaintiff's narrow interpretation of the Act would render these provisions meaningless.

Moreover, the legislative history confirms the clear import of Sections 2 and 3. As plaintiff points out, Senate

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[8] Section 3 provides as follows:

"Any person who has, in good faith, located, selected, entered, or purchased, or any person who shall locate, select, enter, or purchase, after July 17, 1914, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same." Title 30 U.S.C. § 123.

[9] Section 2 provides in pertinent part:

"* * * Nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands *which have been withdrawn or classified* as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, nor shall persons *who have located, selected, entered, or purchased lands subsequently withdrawn, or classified* as valuable for said mineral deposits, be debarred from the privilege of showing, at any time before final entry, purchase, or approval of selection or location, that the lands entered, selected, or located are in fact nonmineral in character." [Emphasis supplied] Title 30 U.S.C. § 122.

Bill 60, introduced April 7, 1913, applied to "oil lands" of Wyoming and provided in part that lands . . . "which *have been* withdrawn or classified as oil lands or *are valuable* for oil shall be subject to appropriate entry under the Homestead Laws . . ." [Emphasis supplied] Passed by the Senate and sent to the House Public Lands Committee, this bill was completely altered by a substitution of the text of H.R. 15036 for the text of Senate Bill 60 and a corresponding change in the title of the bill. So transformed, the measure was favorably reported, H.R. Report 675, 63rd Congress, second session, and subsequently enacted. H.R. 15036 was, save in minor grammatical respects, identical to the Act as passed; a committee report on it, House Report No. 565, was attached to the abovementioned report on Senate Bill 60.

The Department of Interior commented on Senate Bill 60 when it was before the House Committee. On September 13, 1913, the Acting Secretary recommended broadening the bill's coverage "to make [it] general in its character and applicable to all public lands withdrawn or classified as phosphate, nitrates, potash, asphaltic minerals, oil or natural gas, in the form suggested by the Department in its report . . . on Senate Bill 603 and reports . . . on H. R. 1783 and 6203." [10]

On May 11, 1914, the First Assistant Secretary stated as follows:

> "I am in receipt of your request for report on S. 60, which proposes to permit agricultural entry of oil lands in the State of Wyoming. . .

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[10] It appears from the record before us that H.R. 1783 served as the model for H.R. 15036 and applied to "any person who has located, selected, or entered, or any person who shall *hereafter* locate, select, or enter . . . any lands *which are subsequently* classified, claimed or reported as being valuable for potash . . ." [Emphasis supplied]

> "Attention, however, is directed to the fact that line 5, page 2, and lines 7 and 8, 12 and 13, and 17, page 3, . . . refers [sic] to 'oil and gas' while in other portions of the bill and in the title of the act, oil only is mentioned, reference to the gas being presumably inadvertently omitted. It is therefore suggested that wherever the word 'oil' appears in the bill the words 'or gas' should be added."

While both the Senate version of Senate Bill 60 and the Secretary's September 13, 1913 letter refer to lands which "have been withdrawn," both documents also refer to lands which "*are* valuable" for minerals. Significantly, the Act does not utilize the ambiguous tenses, nor does its title.

It is clear that Senate Bill 60 was abandoned and the broader H. R. 15036 adopted by the Congress. The Act refers to lands "withdrawn, classified, or reported," and makes special provision for persons who validly enter land subsequently classified, withdrawn or reported as valuable for the named minerals. Thus, neither the history nor the language of the Act supports plaintiff's argument.

The contention that because the Act did not grant the Secretary power to classify lands its terms were applicable only to lands classified prior to entry assumes that the Secretary's classification power is limited by the President's withdrawal power under the 1910 Act. Such assumption, and therefore plaintiff's argument here, has been considered and rejected.

Plaintiff's final argument that the 1914 Act must be deemed unconstitutional if applicable to lands entered prior to classification assumes that Baxter had a constitutionally-protected right which was violated by the 1916 classification of his land. This is wholly lacking in merit. As we see it the agricultural lands at all times here involved stood in the shadow of a legislative change such as

that which here occurred. The entry, together with the other acts of Baxter, gave him no vested right to a patent free of a mineral reservation.

It must be concluded that the 1914 Act embraced within its terms lands entered prior to classification and prior as well to the passage of the Act. It applied to Baxter's lands and it did not deprive him of any constitutional right.

III.

Whether "Oils" as Used in the Act and in the Patent Embraces Oil Shale.

Plaintiff's final and most cogent argument is that the 1914 Act does not apply to oil shale lands, and thus that the reservation under that Act in Baxter's patent did not affect his rights to the shale; that by not expressly mentioning shale, Baxter acquired the property right to it. Plaintiff argues that oil shale is different from oil, and that in 1914 a reasonable man would have known the two were different. He also argues that the Department of Interior knew the difference in 1914 and that it has treated oil and oil shale differently in administering the public land laws. He concludes that *Congress* in 1914 knew that oil and oil shale were different, and that in failing to include oil shale in the list of minerals in the 1914 Act Congress must be deemed to have intended to exempt oil shale from that Act's terms.

Expert testimony revealed that, notwithstanding the lay concept that they are similar, oil and oil shale differ chemically as well as physically. Oil shale contains an organic hydrocarbon compound termed "kerogen," which is chemically distinct from the hydrocarbon compounds termed "petroleum." There is no clear understanding even today of the exact composition of kerogen; evidently petroleum compounds contain a higher percentage of

hydrogen in relation to carbon than do kerogen compounds. In any event, kerogen decomposes under intense heat to form a liquid oily substance. This substance can be hydrogenated so as to produce several petroleum substitutes. It was pointed out that some naturally-occurring petroleum must also be specially hydrogenated to produce commercially acceptable products. K. E. Stanfield, a Bureau of Mines chemist who has specialized in oil shale studies, testified that in 1915 the process of hydrogenation was not known.

That oil shale is different from oil does not, however, answer the present question—the intent of Congress in 1914 when it used the word "oil" in the 1914 Act. The record reveals that in 1914 very few people knew anything about oil shale, and even the experts were uncertain of its composition. (Indeed, at the present time few people know that oil shale is different.) The first two United States publications discussing oil shale were: "Oil Shale of Northwestern Colorado and Northeastern Utah," an article by E. G. Woodruff and D. T. Day in United States Geological Survey Bulletin No. 581, 1914; and United States Geological Survey Bulletin No. 641-F, *Oil Shale in Northwestern Colorado and Adjacent Areas*, 1915, by D. E. Winchester. The former article, based on surveys conducted in 1913, reported that shale contained substantial amounts of liquid oil. Winchester, after further research, corrected this impression but referred to "wells" of oil shale and in many other ways conveyed the thought that oil shale contained oil. Assuming that Congress knew about oil shale in 1914, there is nothing to indicate that its knowledge was more than vague and general. Indeed, an examination of several publications discussing oil shale, published in 1918 and 1919, reveal that even at those dates oil shale was considered by "experts" to contain oil. See "Billions of Barrels of Oil Locked up in Rocks," *National Geographic Magazine*, February, 1918; "A Symposium on

Western Oil Shales," *The Railroad Red Book,* July, 1919; "The Greatest Oil Field is Right Before Our Eyes," *The Shale Review,* February 10, 1919.

Affidavits of R. G. Spengler, a Bureau of Land Management engineer, reporting the results of his examination of placer mining location certificates in Rio Blanco and Garfield counties, Colorado, during the early 1900's were introduced to reveal the state of knowledge among oil shale placer miners in those early days. No discernible pattern can be traced regarding the manner in which miners located oil shale claims. While many specified oil shale as the mineral for which the location was being made, the majority of certificates mentioned only mineral oils. Furthermore, of the five printed forms supplied by federal officials for use by locators, only one mentioned the word "shale". The twenty to thirty per cent of the locators who filed handwritten oil shale location certificates did not uniformly include the word "oil shale" or "shale" on their homemade forms. Thus, the record reveals that most miners made no distinction between "oil" and "oil shale" when filing location certificates for oil shale claims in the early 1900's.

Copies of the actual patents issued between 1916 and 1955 on lands classified by the 1916 classification letter as mineral lands, valuable for petroleum and nitrogen, were received as bearing on the practice of the Department of Interior subsequent to the passage of the 1914 Act. A total of 144 patents specifically reserved oil shale under the Act. The first such patent was issued in 1918, the year following the award of Baxter's patent. The following formula appears in these 144 patents:

> ". . . reserving . . . oil and gas and all shale or other rock valuable as a source of petroleum and nitrogen . . . upon compliance with the conditions and subject to the provisions and limitations of the Act of July 17, 1914."

Of the remaining 54 patents, one appears to be on land not classified by the 1916 letter and must be dismissed from consideration. The other 53 used a great variety of phrases, such as "oil and gas", "gas and oil", "Oil, gas and nitrate." Baxter's patent appears to be the only one containing the phrase "nitrate, oil and gas."

It must be stressed that all of these patents were issued on oil shale lands, and that the Department considered the reservation phrases sufficient to reserve the oil shale deposits to the United States. While poor draftsmanship cannot excuse failure to delineate sufficiently what rights are reserved when the United States creates surface agricultural interests in public lands, it nevertheless is somewhat significant that all of the patents utilized the word "oil" and referred specifically to the terms of the 1914 Act. If the word "oil" as used in that Act covers oil shale, as the Department maintains, the wording of Baxter's patent would be sufficient to reserve oil shale. We, of course, do not undertake to make any finding regarding other patents issued at later dates.

Plaintiff urges, however, that while the Department's position has been consistent, such consistency lies in a recognition of the difference between oil and oil shale. What the Department's construction of the 1914 Act has been is, therefore, a pertinent inquiry.

The Interior Department apparently first considered oil shale in connection with the 1914 Act in the June 29, 1916 letter from the Commissioner of the General Land Office to the Glenwood Springs, Colorado, Receiver.[11] On May 20, 1920, Instructions of the Department indirectly considering oil shale and the 1914 Act, declared:

> "Such classifications of lands containing oil shale have been accepted by the Department as *prima facie*

[11] See page 5, supra.

> evidence of the value of the lands so classified for mining purposes so as to require agricultural entrymen therefor to accept restricted patents to their claims under the provisions of the act of July 17, 1914 (38 Stat., 509), or assume the burden of establishing their nonmineral character." 47 L.D. 548, 551.

In *Dennis v. Utah*, 51 L.D. 229 (1925), *James W. Bell*, 52 L.D. 197 (1927), *Smallhorn Oil Refining Co., et al.*, 52 L.D. 329 (1927), and *Union Oil Company of California*, 61 I.D. 106 (1953) the Department in a variety of contexts considered oil shale lands as subject to the terms of the 1914 Act. The following from *Smallhorn*, supra, is particularly pertinent:

> "The act of July 17, 1914, supra, affects public lands which are withdrawn, classified, or reported as being valuable for 'phosphate, nitrate, potash, oil, gas, or asphaltic minerals.' It will be noted that the words 'oil shale' are not found in said act. But the department has long held that lands classified as valuable for oil shale as a source of petroleum and nitrogen were prior to the passage of the leasing act open to mineral entry under the mining laws of the United States and are open 'to nonmineral entry in accordance with provisions of the act of July 17, 1914.' Instructions of May 10, 1920. . .
>
> "It has been noted that the main product of oil shale is oil. The department is of the opinion that the word 'oil' as used in the act of July 17, 1914, may properly be construed to include oil shale, . . ." 52 L.D. at 331, 332.

Plaintiff points to two recent departmental decisions to argue that oil shale has been treated as distinct from oil by the Department. *Ramon P. Colvert, et al.*, Colorado 03022, etc., June 28, 1957, *State of Utah, et al.*, 71 I.D.

393 (1964). Neither of these decisions refutes defendant's argument that the Department has consistently construed the 1914 Act to apply to oil shale lands. In *Ramon P. Colvert* one of the parties had applied for a mineral patent on an oil shale placer claim, which patent was challenged by the holder of an oil and gas lease. *State of Utah* involved construction of the 1958 School Lands Selection Act, 43 U.S.C.A. § 851, which act specifies both oil and oil shale. Furthermore, the land involved in *State of Utah* had been classified as valuable for both oil and oil shale. Acknowledgement of the distinction between oil and oil shale by the Department at the late dates of those decisions in no way impugns its construction of the 1914 Act as applying to oil shale lands. We conclude that the Department's administrative interpretation of the 1914 Act does not reveal a consistent distinction between oil and oil shale.

Defendant cites *United States* v. *Hurlburt*, 10 Cir., 1934, 72 F. 2d 427, to support the argument that the Department's construction of the 1914 Act has received judicial recognition. There the United States sought cancellation of an agricultural patent issued in 1930 to one Hurlburt under the 1891 Homestead Act. The patent, which reserved to the United States "all oil and gas and all shale or other rock valuable as a source of petroleum and nitrogen," was expressly subject to the conditions of the 1914 Act. The land involved had been entered and claimed by Hurlburt in 1915 but included in a 1916 presidential withdrawal of land to create a Naval Oil Shale Reserve. The court affirmed the trial court's holding that Hurlburt's previously-entered land was not subject to the President's withdrawal power under the express terms of the 1910 Pickett Act.[12] The court also made the following observations:

> "Furthermore the land was withdrawn as a naval oil shale reserve. Under [Section 3 of] the Act of

[12] Cf. footnote 5, supra.

July 17, 1914, such lands are subject to settlement, and a patent may be issued with a reservation of the mineral rights in the United States.[3] "[13]

"The record clearly shows that the Land Office in receiving the application and issuing the patent, considered itself bound by such act."

The comments do in general discuss oil shale in the context of the 1914 Act. However, the court was confronted with a very specific problem, unrelated to the question of the intent of Congress in passing the 1914 Act. The best that can be said for *Hurlburt* in relationship to the case at bar is that it is one of few judicial pronouncements which mention oil shale. No case expressly considering the issue here posed has been cited.

The Department's interpretation of the Act which it is authorized to administer is entitled to weight, especially if such interpretation has been long standing and consistent. See *Udall* v. *Tallman*, 380 U.S. 1, 85 S. Ct. 792 (1965); *United States* v. *Hurlburt*, supra. Such interpretation is not here controlling. We must decide whether the term "oil" as used in the 1914 Act was intended by Congress to broadly cover all known sources of oil, or whether it was intended merely to cover petroleum, bearing in mind that oil shale is not oil and that in 1914 it was regarded by those few who had studied the matter as different from oil, at least to the extent that a rock is not a liquid.

To determine whether Congress, in adopting the word "oil", intended to reserve all sources of oil or merely petroleum, we must look to the general purpose and philosophy of the 1914 Act as shown by its terms and its history.

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[13] The court's footnote 3 refers to the provisions of 30 U.S.C. § 123 (see footnote 8, supra).

We earlier pointed out that a bill originally introduced in the House, H.R. 15036, served as the model for what was known as S. 60. The House committee reports on S. 60 and H.R. 15036, together with letters from the Department, show that the amended version broadened the coverage of S. 60, which applied only to "oil lands" of Wyoming. Had Congress referred to "oil lands," or to "petroleum," in the 1914 Act, some support would appear for plaintiff's argument. However, the word of art chosen was "oil".

The Department acquiesced in this choice of words, merely pointing out at one point that inconsistencies in the proposed measure should be remedied by adding the term "gas" where it had been inadvertently omitted. It cannot be seriously contended that the Department in 1914 did not consider oil to cover oil shale but in 1916 did. Nothing in this record supports such suggestion. Rather, the record suggests that if the Department considered the problem at all, it felt the word "oil" as used in the proposed legislation, did include oil shale.

The single discussion recorded in the Congressional Record, of which we take judicial notice, involving any of the predecessors of the 1914 Act, reveals that Congress sought to reserve to the United States all sources of oil known at the time.[14] There is no discussion of oil shale. Congress did not consider this problem. Congress was merely considering the general problem of providing for agricultural use of mineral lands. The Act provided for the named mineral lands what the 1909 Coal Act, 30 U.S.C. § 81, had provided for lands valuable because of their coal content. There was no intent to deprive the people of the United States of their collective right to minerals known to exist in the public lands. Congress, in enacting the 1914 Act, was seeking a formula which would allow

[14] See 51 Cong. Rec. 10493, 10494 (1914), 63rd Cong., 2nd Sess.

homesteaders to utilize mineral land for agricultural purposes and which would also preserve the minerals. The purpose and history of the Act, viewed in light of Congress' overall policy regarding the separation of mineral and surface rights to the public lands, points to the conclusion that Congress used the word "oil" in its broadest sense. It intended to encompass every known source of oil. As it is conceded by both parties that Congress knew oil shale to be a source of oil, it is to be concluded that the broad term "oil" as used in the 1914 Act included oil shale.

Both parties appeal to subsequent legislative enactments of Congress to support their contentions regarding the intent of Congress. The facts are that in the 1920 Mineral Leasing Act, 30 U.S.C.A. § 181, et seq., Congress specifically provided for the leasing of oil shale lands; in 1956 Congress amended the 1914 Act but did not add oil shale to the list of named minerals; in the 1958 School Selection Law, 43 U.S.C.A. § 851, Congress provided for oil shale lands; and in a 1960 Mineral Leasing Act amendment, 30 U.S.C.A. § 241, Congress discussed "oil shale" and "oil-impregnated rock." This record of congressional action can be interpreted to show either a continuing purposeful omission of oil shale from the 1914 Act but purposeful inclusion in the 1920 and 1958 statutes, or a tacit recognition that the 1914 Act covers oil shale. In our view such subsequent actions are of minimal aid in determining anything other than Congress' intent at those times. Certainly, such evidence does not sustain plaintiff's burden of proof regarding Congress' intent in 1914.

Plaintiff finally urges that a 1914 decision of the Supreme Court discussing the meaning of "petroleum" supports the contention that Congress knew oil was not oil shale. *Burke* v. *Southern Pacific Railroad Co.*, 234 U.S. 669, 34 S. Ct. 907 (1914). The Court there considered the railway land grant act of 1866, which expressly exempted "mineral lands" from its terms, and the failure of the

Interior Department to inspect land it deemed "mineral" in connection with a patent application under that act. The Court declared that in construing statutes of Congress, strictly scientific definitions are not controlling when a practical subject has been dealt with in a practical way. 234 U.S. at 679. Thus "petroleum", though found not a "mineral" in the scientific sense, was construed to fall within the statutory term "mineral" as used by Congress in the 1866 Act. Had Congress utilized the term "petroleum" in the 1914 Act, the definition of that term formulated by the Court in the course of its decision in *Burke* might be given some weight; Congress, however, used the general term "oil", and thus it furnishes plaintiff no support.

Burke can in no way be regarded as holding that Congress used the term "oil" so as to exclude oil shale from the terms of the 1914 Act. *Burke,* it should be here noted, *does* hold that a practical statute such as this must be construed in accordance with common usage. The instant case is not one where words capable of general construction have acquired a more narrow technological meaning through judicial construction. See *Barber* v. *Gonzales,* 347 U.S. 637, 74 S. Ct. 822 (1954). The term "oil" must be construed in light of the general usage of the term in 1914 and the purposes of the 1914 Act.

By the 1914 Act Congress sought to make available for agricultural use land classified as mineral land which would otherwise be unavailable to homesteaders. Such purpose was in accord with the legislative policy to create both surface and sub-surface estates for the full development of all the public resources. See *United States* v. *Sweet,* 245 U.S. 563, 38 S. Ct. 193 (1918). The same policy was expressed in the 1909 and 1910 acts permitting homestead development of lands classified as mineral because of their coal content. 30 U.S.C.A. §§ 81, 83. If the 1914 Act is inapplicable to oil shale lands, a question is raised as to

whether homestead patents could validly be issued by the Department on lands classified as mineral because of their oil shale content. See *Diamond Coal & Coke Co.* v. *United States,* 233 U.S. 236, 34 S. Ct. 507 (1914); *Leonard* v. *Lennox,* 8 Cir. 1910, 181 Fed. 760. Under the view that we have taken we are, of course, not called on to decide this issue.

Plaintiff finally argues that the purposeful exclusion of oil shale is understandable under a "compatible use" doctrine—that the mining of oil shale is incompatible with agricultural development of the surface land. This, they say, explains Congress' alleged distinction. This is patently invalid. It is unreasonable to hold that Congress found oil shale mining too destructive of the surface of the land to permit any agricultural use thereof, although no such finding was made concerning the mining of coal or asphaltic minerals. Instead we conclude that the construction of the Department of Interior, which in no way binds this court, is the most reasonable one in light of the Act's purpose.

In sum, then, we hold that the plaintiff has failed to sustain his burden of proof. We must, therefore, conclude that the term "oil" as used in the 1914 Act permitting homestead surface patents to issue on mineral lands withdrawn or classified as "oil" or valuable for "deposits" thereof, with a mineral reservation to the United States "of the deposits on account of which the lands were withdrawn or classified or reported as valuable," was used by Congress in a broad, generic sense and that it encompasses all sources of oil which were then known.

It follows that oil shale is covered by the term "oil" as used in the Act, and that the reservation in Baxter's patent under the 1914 Act reserved the rights to the oil shale content of his land to the United States. The decision of the Secretary should be, and the same is affirmed.

The defendant is directed to present to the Court an appropriate form of judgment for the Court's signature. Ten days are allowed for this. Meanwhile, the entry of judgment will be withheld until formal judgment is signed.

DATED at Denver, Colorado, this Sixteenth day of February, A. D. 1966.

BY THE COURT:
WILLIAM E. DOYLE
William E. Doyle, *Judge*
United States District Court

[Filed, June 22, 1967]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 8722—MAY TERM—1967.

C. W. BRENNAN, *Appellant*,

v.

STEWART L. UDALL, Secretary of the Interior, *Appellee*.

Appeal From the United States District Court for the District of Colorado

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Fred M. Winner, of the Firm of Winner, Berge, Martin & Camfield, Denver, Colorado, (John J. Wilson, of the Firm of Whiteford, Hart, Carmody & Wilson, Washington, D.C.; William S. Livingston, John D. Knodell and William E. Rollow, Denver, Colorado, with him on the brief), for Appellant.

S. Billingsley Hill, Attorney, Department of Justice, Washington, D.C., (Edwin L. Weisl, Jr., Assistant Attorney General; Lawrence M. Henry, United States Attorney and David I. Shedroff, Assistant U.S. Attorney, with him on the brief), for Appellee.

Before PICKETT and SETH, Circuit Judges, and CHRISTENSEN, United States District Judge.

PICKETT, Circuit Judge.

The appellant Brennan owns 160 acres of land in Rio Blanco County, Colorado, which, after having been classi-

fied as a valuable source of petroleum and nitrogen, was in 1917 patented to George H. Baxter, reserving to the United States "all the nitrate, oil, and gas in the lands", as required by 30 U.S.C. §§ 121-123.[1] In 1963 Brennan, together with Humble Oil and Refining Company, holder of an option to purchase the land, petitioned the Director of the Bureau of Land Management for a decision that oil shale was not included in the reservation. The Director, with the approval of the Assistant Secretary of the Interior, held: "It is clear that it was the intention of the parties to allow patent by reserving the oil shale to the United States and that the appropriate reservation of 'oil and gas' includes oil shale." Thereupon Brennan brought this suit seeking a review of the administrative determination, a declaratory judgment, and an injunction restraining the Secretary of the Interior from asserting any claim adverse to the ownership of Brennan in the oil shale deposits in the land. The United States District Court for the District of Colorado held that the reservation included oil shale and denied the relief sought. Brennan v. Udall, 251 F.Supp. 12. We affirm.

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[1] 30 U.S.C. § 121 provides:

"Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the non-mineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same. All applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of sections 121-123 of this title. As amended June 16, 1955, c. 145 § 2, 69 Stat. 138.

It is the basic contention of Brennan that the reservation authorized by the 1914 statute and that contained in the patent does not include "oil shale." The crux of the argument is that the term "oil", as used in mineral land statutes and in the Baxter patent, refers to a liquid hydrocarbon mineral capable of migrating in its natural form and does not embrace a deposit of oil shale, which is a solid mineral containing no oil, although petroleum may be produced by a process of destructive distillation which converts organic materials in the rock into liquid. The Secretary admits that the term "oil" ordinarily defines a liquid, while oil shale is a rock usually of an origin different from that of oil and is composed of a mixture of compounds which are soluable in oil solvents.[2] It is conceded that oil shale as a rock, unlike coal, has little intrinsic value. Its value at the time of the classification in 1916, and now, is solely as a possible source of oil. The Secretary states that the real distinctions between oil in liquid form and oil shale are the mode of occurrence and the method of recovery, which accounts for Congress and the Department of the Interior treating them, on some occasions, as separate and distinct. The Secretary contends that from the time of the enactment of the 1914 statute, the Department of the Interior has treated the term "oil" as used in the statute and in the patent reserva-

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[2] The parties stipulated:

> "Petroleum, oil shale and coal are all hydro-carbon mixtures, usually containing other elements, such as sulphur, nitrogen and oxygen. The organic materials in oil shale called 'kerogen', as well as the organic materials in coal, are largely insoluble in oil solvents, such as benzine, ether, etc., while petroleums are essentially completely soluble therein. Each of these mixtures is a mixture of compounds, each compound having an individual chemical formula, but none of the three groups has a specific formula. However, although oil, oil shale and coal may contain the same elements, they are not chemically combined in the same manner in the three substances."

tions as including oil shale, that Congress has taken no action affecting this treatment, and that under these circumstances the courts should accept the Department's determination.

There is little, if any, dispute in the material facts. During the year 1907 Baxter entered upon the land involved here and in 1909 made a formal homestead filing. At the time of entry and filing, the land was considered nonmineral and so designated by Baxter in his filing. The 1914 statute authorized agricultural entry upon mineral lands, but required a reservation to the United States of the minerals named therein. On May 23, 1916 the Director of the Geological Survey notified the Commissioner of the General Land Office of the great potential for petroleum in the oil shale deposits of Colorado, Utah, and Wyoming, and accordingly classified the tracts, including the Baxter entry, as mineral lands "valuable as a source of petroleum and nitrogen, * * *[3]" Shortly thereafter, following the instructions of the Commissioner, the local land office noted the classification on their tract books. On November 22, 1916, Baxter was advised that the date for the taking of final proof in connection with his homestead entry had been fixed, and enclosed was a form designated as a "Petroleum Waiver." The waiver provided:

> "I, . . . hereby apply to have my entry considered as made under the Act of July 17, 1914 (38 Stat. 509) and hereby consent that the patent issued to me thereunder shall contain the provisions, reservations, conditions and limitations of the said act."

Baxter executed the waiver and the patent issued shortly thereafter. Nothing further occurred concerning the reservation until the aforesaid request to the Director of the Bureau of Land Management in 1963.

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[3] The duties of the Director of the Geological Survey are set forth in 43 U.S.C. § 31(a).

At the outset, the Secretary challenges the jurisdiction of the court because the relief sought seeks to diminish the title of the United States in the lands, consequently it is a necessary party and has not consented to be sued. We agree with the trial court that the decision of the Secretary of the Interior adversely affects Brennan's title to the land in question and is reviewable under the Administrative Procedure Act. 5 U.S.C. § 1009, (now §§ 701-706). Coleman v. United States, 9 Cir., 363 F. 2d 191; Adams v. Witmer, 9 Cir., 271 F. 2d 29; Denison v. Udall, D.C. Ariz., 248 F.Supp. 942; Stewart v. Penney, D.C. Nev., 238 F.Supp. 821. Cf. Homovich v. Chapman, D.C. Cir., 191 F. 2d 761.

The Department of the Interior's determination that oil shale should be reserved under the 1914 Act was first disclosed by the 1916 classification which was based exclusively upon the findings of the geological survey that the oil shale deposits of Colorado, Utah and Wyoming were valuable as a source of petroleum and nitrogen. On May 10, 1920, the Secretary of the Interior advised the Commissioner of Public Lands that oil shale was accepted as prima facie evidence of the value of lands classified for mining purposes, so as to require an agricultural entryman to accept restricted patents under the provisions of the 1914 Act. 47 L.D. 548. To the same effect was the decision of Dennis et al. v. State of Utah, 51 L.D. 229 (1925). In 1927 the Department recognized that a valid mining claim to oil shale deposits could be made on lands where the homestead patent had reserved to the United States the "oil and gas." James W. Bell, 52 L.D. 197. See also Smallhorn Oil Shale Refining Co. et al., 52 L.D. 329 (1928), which referred to an order issued in 1918 by the Commissioner of the General Land Office. That order provided, in part:

> "It has been noted that the main product of oil shale is oil. The department is of the opinion that the word 'oil' as used in the act of July 17, 1914, may properly

> be construed to include oil shale, and under such construction the reservation in Crampton's patent is sufficient to reserve to the United States the oil shale deposits in the patented land."

Union Oil Co. of California, 61 I.D. 106 (1953) followed the Bell case, stating that it had been "consistently followed for some 30 years, therefore it should not be changed in the course of adjudication except for compelling reasons," citing Luckenbach Steamship Co. v. United States, 280 U.S. 173, 182.

Although the position of the Department of the Interior has varied over the years as to the form of the reservation in patents embracing oil shale lands, it is abundantly clear that for fifty years it has consistently construed the 1914 Act to authorize the classification of lands containing oil shale deposits as a valuable source of petroleum and nitrogen and to require the reservation of such deposits when patents are issued. The Department's construction of the statute has been made a matter of public record on numerous occasions. It is significant that in the Baxter patent reservation, and in many others, the term "oil" was used, although there was no evidence of the presence of oil except that recoverable from the oil shale. We conclude that the Department of the Interior's interpretation of the meaning of the term "oil" as used in the 1914 statute and in the patent reservations is reasonable, and the courts must therefore respect it. Udall v. Tallman, 380 U.S. 1, reh. denied 380 U.S. 989; Unemployment Comm'n v. Aragon, 329 U.S. 143. Cf. State of Wyoming v. United States, 10 Cir., 310 F. 2d 566, 580, cert. denied 372 U.S. 953. Furthermore, at all times since the 1914 Act, Congress has not seen fit to interfere with the Departmental construction of the 1914 statute. Practices of the Department of the Interior with respect to oil shale under the 1914 Act were brought to the attention of Congress when the Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq., was

considered, and in 1956 when the 1914 Act was amended to simplify the procedure established by the Bell decision, supra. S.R. 2524, 84th Cong. 2d Sess. (1956); U. S. Code Cong. & Admn. News p. 3391.[4] It is obvious that throughout

[4] Senate Report 2524, 84th Cong. 2d Sess., regarding H.R. 6501, reads, in part:

> "Under the Department of the Interior decision in the case of James W. Bell (52 I.D. 197 (August 1927)) the owner of a valid mining claim located before February 25, 1920, on lands covered by the 1914 act, in order to obtain a patent to the minerals, is required to acquire the outstanding interest of the surface owner and thereafter to execute a deed of reconveyance to the United States; subsequently, a mineral patent to the land, including both the surface and the minerals, is issued to the mining claimant. From 1946 to 1955, inclusive, 71 mining claims, including 67 oil shale claims, were issued under this procedure. The committee is informed that in a few cases mining claimants have been unable to obtain the cooperation of the owners of the surface estate and have been prevented thereby from obtaining patent to the mineral estate."

At a hearing before the Subcommittee examining this proposed legislation, Representative Aspinall of Colorado, who introduced the bill, stated:

> "As it now stands, if a mining claim exists on a leasable mineral under land upon which a non-mineral surface right has been granted under the Act of July 17, 1914, the only way this valid right can be taken to patent is for the mining claimant to obtain and reconvey to the government the surface title. After this, the mining claim can be granted and patented and the surface right can be reestablished. Thus, if the surface owner refuses to cooperate in this process, the mining claimant is left with a valid right—but a right foreshortened by his inability to obtain patent. * * *
>
> "In my own area, this [Act] would affect mining claims for oil shale, a mineral or oil bearing rock reserved under the leasing laws. * * *
>
> "The law of 1914 which provides for the reservation of minerals and patents to be issued at that date did not make it possible to gain a patent on mineral claims which were validly entered into between 1914 and 1920. In my district there are

the years Congress knew that the Department of the Interior had construed the term "oil", as used in the 1914 Act and in many of the patent reservations, to include oil shale deposits, and it apparently accepted the administrative determination. At least it did not consider the interpretation as being contrary to the statute. Cf. Boesche v. Udall, 373 U.S. 472, 482. The patent in the Bell case had reserved only the "oil and gas" in the lands. If the reservation did not include oil shale, the mineral locator claiming the oil shale had no valid mineral claim, and the 1956 amendment was meaningless so far as Bell was concerned. Nor can there be any doubt but that Baxter knew in 1917 when he executed the consent to the issuance of the patent under the 1914 Act that because of the existence of the oil shale deposits the lands had been classified as a valuable source of petroleum and nitrogen, and he made no objection to the reservation.

Finally, Brennan contends that Baxter, having entered upon the land prior to the enactment of the 1914 statute, was entitled to a patent free from any reservations. It is argued that when a homesteader enters upon land and complies with the conditions imposed by statute, he is entitled to a patent vesting title in him as of the time of a valid entry upon the land, citing Knapp v. Alexander Co., 237 U.S. 162, and Ard v. Brandon, 156 U.S. 537. These cases involve conflicts between the entrymen and third parties and were not concerned with statutes directing withdrawal, classification or the reservation of mineral

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a few cases—and we do not know how many but there are a few of them—where there is a valid existing mineral claim to oil shale where there was also a patent on the surface rights of the same land. In one particular case the owner of the surface rights through a patent issued by the government has refused to reconvey any surface rights to the government so that the government then could issue a new patent including the minerals in the area, and thereby permit the new patentee to give a deed to the owner of the surface lands." • • •

rights prior to final proof of the homesteader upon which a final certificate and patent would issue. Prior to submitting his final proof, which was subsequent to the 1916 classification of the land as a valuable source of petroleum and nitrogen, Baxter freely consented that his entry be considered as made under the 1914 Act and that the patent, when issued to him, should contain the reservations provided for in that Act. At that time he had the right to show that the lands were non-mineral in character and receive accordingly an unrestricted patent.[5] Instead, he chose to accept the patent with the reservations, and an attack upon it by his successors in interest almost fifty years after its issuance comes too late. Wetzel v. Minnesota Ry. Co., 169 U.S. 237; Snauffer v. Stimson, D.C. Cir., 155 F. 2d 861; Adair v. Shallenberger, 7 Cir., 119 F. 2d 1017; United States v. Nudelman, 7 Cir., 104 F. 2d 549, cert. denied 308 U.S. 589; American Bond and Mortgage Co. v. United States, 7 Cir., 52 F. 2d 318, cert. denied 285 U.S. 538.

Affirmed.

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[5] The Departmental Regulation, dated March 20, 1915, relating to the 1914 Act in effect at the time, provided, in part:

"(b) Under this proviso, persons who have located, entered, selected, or purchased lands subsequently withdrawn or classified as valuable for such mineral deposits, are allowed the privilege of showing, at any time before final entry, purchase, or approval of selection or location, that the lands are in fact nonmineral in character. * * *

"A withdrawal or classification will be deemed prima facie evidence of the character of the land covered thereby for the purpose of this act. Where any nonmineral application to select, locate, enter, or purchase has preceded the withdrawal or classification and is incomplete and unperfected at such date, the claimant not then having obtained a vested right in the land, must take patent with a reservation or sustain the burden of showing at a hearing, if one be ordered, that the land is in fact nonmineral in character and therefore erroneously classified or not of the character intended to be included in the withdrawal. . . ."

In Reply Refer to:

6.03c
Glenwood Springs
03874
Patent No. 601476

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON 25, D. C.

Jan 8 1964

Decision

C. W. BRENNAN AND
HUMBLE OIL AND REFINING CO.,
Petitioners.

Act of July 17, 1914;
30 U.S.C. 123

The petitioners have requested a statement setting forth the Government's mineral interest in the SW¼SW¼ sec. 16, N½NW¼, SW¼NW¼ sec. 21, T. 2 S., R. 97 W., 6th P.M. Colorado. These lands were included in George W. Baxter's homestead entry, Glenwood Springs 03874, for which patent No. 601476 issued, in September 1917. The patent contained an "oil and gas" reservation pursuant to sec. 3 of the act of July 17, 1914 (30 U.S.C. 123). This decision is limited to whether oil shale is included in the oil and gas reservation.

The Baxter entry was subject to cancellation prior to July 17, 1914, because it covered lands then valuable for oil shale and thus reserved for disposition under the mineral land laws. 43 U.S.C. 201, 30 U.S.C. 21 Cf. *Deffebach* v. *Hawke*, 115 U.S. 392 (1885); *Colorado Coal & Iron Co.* v. *U.S.*, 123 U.S. 307 (1887). But after the act of that date, the entry could be and was passed to patent upon the entryman's consent that the patent to be issued "thereunder shall contain the provisions, reservations, conditions and

limitations of the said act." It is clear that it was the intention of the parties to allow patent by reserving the oil shale to the United States and that the appropriate reservation of "oil and gas" includes oil shale. *Smallhorn Oil Shale Refining Co., et al.*, 52 L.D. 329 (1928).

H. R. HOCHMUTH
Associate Director

Approved: Jan 20 1964

JOHN A. CARVER, JR.
Assistant Secretary of the Interior

Statutes Involved

ACT OF JULY 17, 1914, C. 142, § 21, 38 Stat. 509, 30 U.S.C. 121, 122, 123:

"§ 121. Agricultural entry or purchase of lands withdrawn or classified as containing phosphate, nitrate, potash, oil, or gas; reservations to United States; application

"Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same; * * *

"§ 122. Same; patents; reservation in the United States of reserved deposits; acquisition of right to remove deposits; application for entry to disprove classification

"Upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made, the locator, selector, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be expressly directed by law. Any person qualified to acquire the reserved deposits may enter upon said

lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages. Nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, nor shall persons who have located, selected, entered, or purchased lands subsequently withdrawn, or classified as valuable for said mineral deposits, be debarred from the privilege of showing, at any time before final entry, purchase, or approval of selection or location, that the lands entered, selected, or located are in fact nonmineral in character.

"§ 123. Same; persons locating lands subsequently withdrawn or classified; patents to

"Any person who has, in good faith, located, selected, entered, or purchased, or any person who shall locate,

select, enter, or purchase, after July 17, 1914, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same."

ACT OF MARCH 3, 1891, AS AMENDED BY THE ACT OF JUNE 6, 1912, 43 U.S.C. 161, 162, 164:

Section 161. Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; * * *

"§ 162. Application for entry; affidavit

"Any person applying to enter land under section 161 of this title shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, * * * and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to

the land applied for; * * * upon filing such affidavit with the officer designated by the Secretary of the Interior on payment * * * of $10 when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified.

"§ 164. Certificate or patent; issuance

"No certificate shall be given or patent issued therefor until * * * the person making such entry, * * * proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, except as provided in section 174 of this title, and that he, she, or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, * * *"

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 634

C. W. BRENNAN, PETITIONER

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27a–35a) is reported at 379 F. 2d 803. The opinion of the district court (Pet. App. 1a–26a) is reported at 251 F. Supp. 12.

JURISDICTION

The judgment of the court of appeals was filed June 22, 1967. The petition for a writ of certiorari was filed on September 19, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the courts below correctly refused to disturb the long-standing ruling of the Secretary of the

279-597—67——1

Interior that the reservation of minerals to the United States required by a 1914 statute in homestead patents to lands classified as valuable for oil, gas or nitrates, embraced oil shale valuable as a source of oil and nitrogen.

2. Whether the mineral reservation was validly required after the homestead entry but before final proofs and payment were submitted.

3. Whether, under the facts, the patentee agreed to the reservation of oil shale rights by the United States.

STATUTE INVOLVED

The Act of July 17, 1914, 38 Stat. 509, as amended (30 U.S.C. 121–123), is set out in the Appendix to the Petition (pp. 38a–40a).

STATEMENT

In 1907, George H. Baxter, petitioner's predecessor in title, settled upon a 160-acre tract of agricultural public lands in Colorado (R. 135, 136). In 1909, he filed his formal application to enter the land under the Homestead Act (43 U.S.C. 161–164) (R. 156). He described the land as essentially non-mineral (R. 157).

Soon thereafter, Congress, in order to permit agricultural entry upon lands valuable for certain minerals, passed the Act of July 17, 1914, 38 Stat. 509 (30 U.S.C. 121–123), which authorizes agricultural entry (with reservation of the minerals to the United States) on lands previously entered or thereafter entered where the lands were "withdrawn or classified as [containing] phosphate, nitrate, potash, oil, gas,

or asphaltic minerals, or which are valuable for those deposits" (Pet. App. 38a).

Subsequently, on May 23, 1916, the Director of the Geological Survey wrote to the Commissioner of the General Land Office as follows (R. 202):

> The oil shales of western Colorado and adjoining areas constitute an undeveloped source of petroleum to which attention was called by the Geological Survey in 1901, and it is now recognized as possible that these shales will prove equally important as a source of nitrogen. During the field seasons of 1913, 1914, and 1915, reconnaissance examination in this region was actively carried forward, and it was demonstrated that over wide areas oil shales are present which average higher in petroleum content than those commercially worked in other countries. The average shale tested within the area examined yields more than one-half barrel of crude oil per short ton of rock and a yield of one barrel per ton is not uncommon.
>
> The net result of oil shale investigations already made is that the oil-shale areas in Colorado, Utah, and Wyoming constitute a latent petroleum reserve whose possible yield is several times the estimated total remaining supply of petroleum in the United States.
>
> While the data at hand are not sufficient to warrant a specific statement as to the total recoverable nitrogen content of these shales, it is believed possible that this will prove so large as to give these deposits a value as a source of nitrogen equal to their value as a source of petroleum.

> In view of the high prospective mineral value of lands underlain by oil-shale deposits it is, of course, apparent that they should not be permitted to be acquired under the nonmineral land laws. The lands have not been recommended for withdrawal because the oil-shale industry is not yet developed in the United States, and as it is desired to give opportunity for the establishment of experimental plants, it is believed the lands should remain open for the present to acquisition under the mineral-land laws, even though they are ambiguous and but poorly adapted to deposits of this type.
>
> Accordingly, I hereby classify the tracts listed below as mineral lands, valuable as a source of petroleum and nitrogen, and request that you make the proper notation of the classification upon your records * * *.

Baxter's land was within the areas so classified (R. 9, 202). On June 29, 1916, the Commissioner advised the local Land Office of the classification, stating that it "will be operative under and subject to the provisions" of the 1914 Act and that the tract books should note these lands as "valuable as a source of petroleum and nitrogen" (R. 203–204).

On November 16, 1916, the Land Office submitted to Baxter for signature a "petroleum waiver" which provided (R. 145, 149):

> I * * * hereby apply to have my entry considered as made under the Act of July 17, 1914 (38 Stat. 509) and hereby consent that the patent issued to me thereunder shall contain

the provisions, reservations, conditions and limitations of said act.

Baxter executed the waiver and, in January 1917, made his final proof and payment to the Land Office[1] (R. 135–144). A final certificate and a patent were subsequently issued, each reserving to the United States all "nitrates, oil and gas," expressly pursuant to the 1914 Act (R. 131, 160–161).

Nothing further occurred until 1963, when petitioner, as Baxter's successor in title, sought a decision from the Bureau of Land Management that oil shale was not included in the terms "oil, gas or nitrate" as used in the 1914 Act and, hence, was not reserved in the patent (R. 10, 159–160). The Bureau concluded (R. 4; Pet. App. 36a–37a):

> The Baxter entry was subject to cancellation prior to July 17, 1914, because it covered lands then valuable for oil shale and thus reserved for disposition under the mineral land laws. 43 U.S.C. 201, 30 U.S.C. 21 Cf. Deffebach v. Hawke, 115 U.S. 392 (1885); Colorado Coal & Iron Co. v. U.S., 123 U.S. 307 (1887). But after the act of that date, the entry could be and was passed to patent upon the entryman's consent that the patent to be issued "thereunder shall contain the provisions, reservations, conditions

[1] In the final proof papers, Baxter and his two witnesses stated that to their knowledge there were no indications of minerals of any kind on the land. These two witnesses had also been the witnesses to Baxter's execution of the consent to the 1914 Act mineral reservation. Notwithstanding the possible conflict between the answers in the final proof and the execution of the consent, the records indicate no protest by Baxter to the inclusion of the reservation nor any contest on this issue.

and limitations of the said act." It is clear that it was the intention of the parties to allow patent by reserving the oil shale to the United States and that the appropriate reservation of "oil and gas" includes oil shale. Smallhorn Oil Shale Refining Co., et al., 52 L.D. 329 (1928).

That decision was approved by the Assistant Secretary of the Interior on January 20, 1964 (R. 4).

Petitioners then instituted this action to enjoin the Secretary from asserting any rights to oil shale deposits in the tract. Both the district court and the court of appeals upheld the Secretary's ruling.

ARGUMENT

The decision below rests (1) upon a consistent construction by the Secretary of the Interior, initiated 50 years ago and known to Congress for most of that period, that the reservation of "oil" in the 1914 Act includes oil shale "as a source of petroleum," and (2) upon a "petroleum waiver" executed by petitioner's predecessor in title on the basis of that construction. The broad, novel effect on western land titles which petitioner seeks to assert is thus simply not present. Since the court below merely sustained that construction and gave proper effect to the petroleum waiver made in the same setting and terms, no further review is warranted.

In any event, the determination that the required reservation of "oil" in the Act embraced oil shale—principally valuable as a source of petroleum—was reasonable. It has since been consistently followed by the Secretary and, as the court below noted, Congress

has repeatedly acted on the basis of that view without treating it as contrary to the statute (Pet. App. 32a–34a). Cf. *Udall* v. *Tallman*, 380 U.S. 1. The classification of Baxter's land as mineral, subsequent to entry but before final proof and payment, was expressly contemplated by Sections 2 and 3 of the 1914 Act (Pet. App. 12a). Moreover, Baxter consented, in the petroleum waiver, to application of the 1914 Act to his entry, and did not contest its classification as mineral. Baxter's land contained no known oil, except that which could potentially be derived from oil shale. It cannot reasonably be held now that Baxter did not know that his tract was classified as mineral because of the oil shale.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Respondent's Brief raises the novel contention that the Petroleum Waiver (R. 145, 149) executed by the original homesteader was done so by him "on the basis of . . . [Respondent's presently urged administrative] construction" of the term "oil" to include oil shale (Res. Br. p. 6). This is not so. No such understanding can be attributed to the homesteader

here. The Petroleum Waiver was signed by the homesteader in 1916; it did not mention oil shale (R. 149). The Department did not publish any decisions relating to oil shale until 1920.[1] Its first reported decision construing a reservation of "oil" pursuant to the 1914 Act[2] to include oil shale did not come until 1927.[3]

Respondent's Brief further attempts to leave this Court with an impression of uniform agency action by suggesting that its now urged interpretation of the term "oil" is a "consistent construction . . . initiated 50 years ago" (Res. Br. p. 6). This, too, is misleading. Inconsistency, not uniformity, characterize the positions adopted by the Department over the years.

A contrary position to that now asserted was taken by the Department in *State of Utah* (1964) 71 I.D. 392. There (in an effort to retain for the United States producing oil and gas wells located on mineral lands selected by the State of Utah for State school lands) the Department distinguished between oil and oil shale subject to reservation pursuant to the 1914 Act as follows:

> "It would appear to follow that, if the base land is mineral land and the selected land is both valuable *for oil shale and valuable for oil or gas* and

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[1] See *Instruction* (May 10, 1920) 47 L.D. 548.

[2] Act of July 17, 1914, 38 Stat. 509 (30 U.S.C. 121-123).

[3] See e.g. *Smallhorn Oil Shale Refining Company et al.* (1927) 52 L.D. 329; *James W. Bell* (1927) 52 L.D. 197. These being the only reported cases Petitioner can find holding that a reservation of "oil" in a patent made pursuant to the 1914 Act included oil shale. While other Department cases have held that the 1914 Act applied to oil shale lands, these usually involved cases where oil shale was specifically reserved in the patent. See *e.g. Union Oil Co. of California* (1953) 61 I.D. 106.

> is situated within the known geologic structure of a producing oil or gas field or included in a producible oil and gas lease, *the State may obtain the selected land, including the oil shale deposits, upon consenting to a reservation to the United States under the 1914 Act of the oil and gas* in the selected land. . We so conclude". (71 I.D. at 403-404) (Emphasis supplied).

Nor can it seriously be argued that the Department customarily regarded a reservation of "oil" to include oil shale. To the contrary, the Department specifically reserved *both* oil *and* oil shale in over 80 per cent of the patents which it issued over the years for the Colorado oil shale lands (R. 206-207).[4]

Numerous other Departmental decisions similarly distinguish between oil and oil shale, holding the former does not include the latter. See, *e.g., Assessment Work on Oil-Shale Claims* (1928) 52 L.D. 333 (holding that the term "oil lands" does not embrace oil shale lands); *Ralph T. Richards* (1952) 52 L.D. 336 (construing the term "oil" used in the Act of June 25, 1910 to exclude the various solid hydrocarbon minerals from which oils could be manufactured); and *Union Oil Company of California, Ramon P. Colvert,* Gower Fed. Ser. BLM 1957-87, aff'd 65 I.D. 245 (holding that oil and oil shale are not the same under the various mineral laws of the United States).

If any uniformity can be gleaned from the Department's conduct over the years, it is one of construing

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[4] Presumably the Department was cognizant of this Court's repeated rulings defining "oil" as a liquid hydrocarbon existing naturally in the earth—and not a solid from which oils can be manufactured. (See cases collected at pp. 14-15 of the Petition).

the term "oil" in whatever context which appeared at the time to enhance the property interests of the United States Government. Certiorari should be granted.

Respectfully submitted,

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